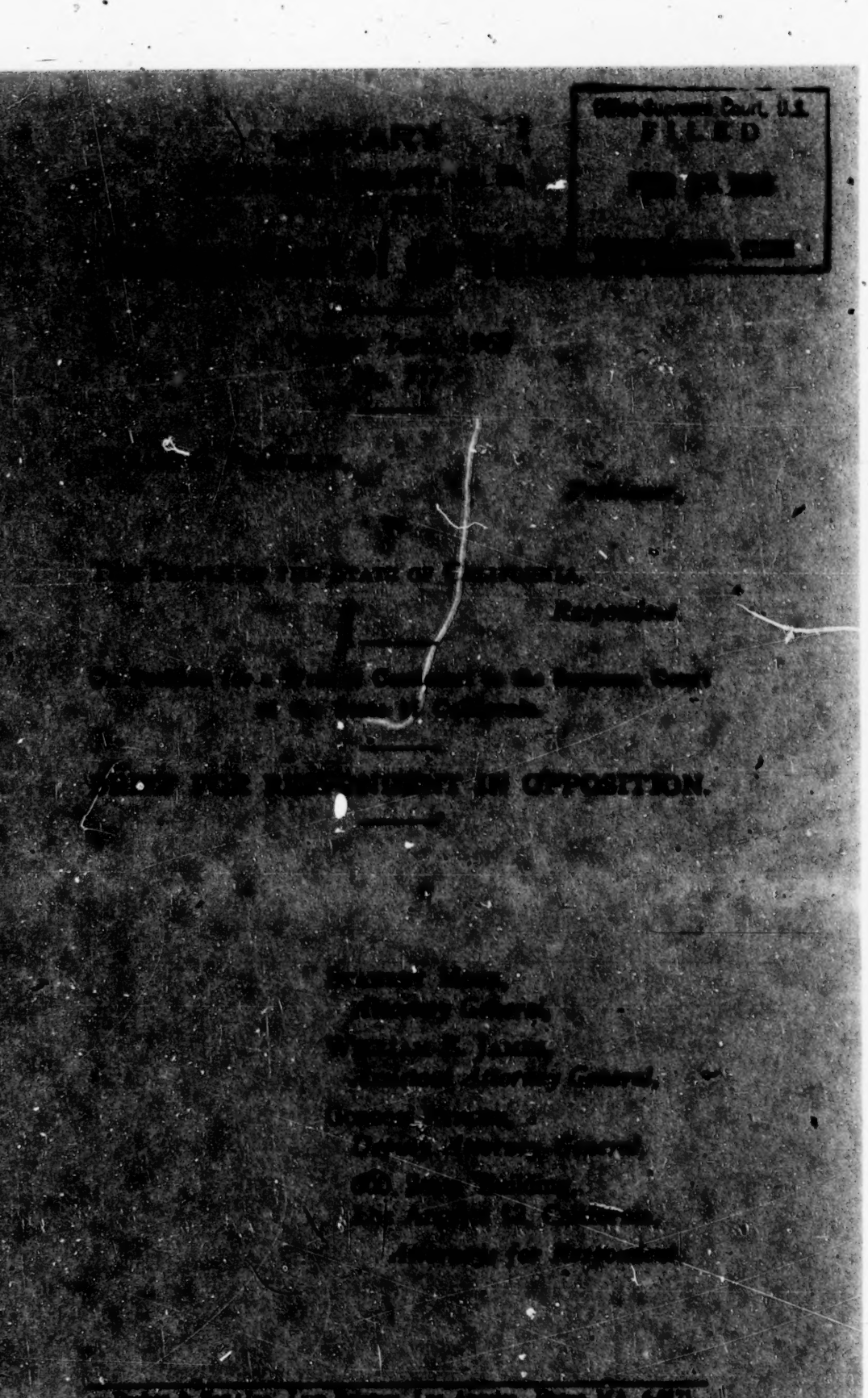

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IN THE

# Supreme Court of the United States

October Term, 1962
No. 777

DONALD G. FRANKLIN,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION.

### Opinion Below.

The opinion of the California Supreme Court is reported at 58 A. C. 309, and 23 Cal. Rptr. 779.

### Jurisdiction.

The jurisdictional requisites are set forth in the Petition. However, it should be noted that of the alleged violations of due process discussed hereinafter, the second was never urged upon the California Supreme Court as a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, and the first, third and fourth were not so urged until Franklin's petition for rehearing, which was denied

without opinion by the California Supreme Court. Thus, none of the alleged federal questions have been appropriately raised and preserved in the California proceedings. (Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, Ed. Wolfson and Kirkham, Sec. 75, and cases cited.)

## Questions Presented.

1. Was it a denial of due process to deny Franklin's motion for a separate trial?

2. Was it a denial of due process to fail to strike references to Franklin in two recorded conversations between his codefendant Rosoto and Rosoto's half-brother, Michael Rosoto, where the court was not asked to strike them, and the court admonished the jury at the time the evidence was introduced solely against Rosoto, and in formal instructions at the close of the trial, that the conversations were not to be deemed evidence against Franklin?

3. Was it a denial of due process to allow cross-examination of Franklin respecting his acquaintance with his codefendants Rosoto and Vlahovich where, on direct, Franklin had denied his guilt of murder and conspiracy in general terms?

4. Was the evidence insufficient to establish Franklin's guilt of murder and of conspiracy to obstruct justice?

## Statement of the Case.

Leslie John Simpson owned and operated the South Seas Restaurant in Anaheim. The restaurant was robbed shortly after 2 A.M. on March 9, 1957. By way of complaint filed June 5, 1957 in the Municipal Court of the Anaheim-Fullerton Judicial District, Orange County, Joseph Rosoto was charged in Count I with the armed robbery of Simpson on March 9 and in Counts II and III with the armed robbery of Willard C. Howe and Raymond R. Allen, who were present in the restaurant. The preliminary hearing was held January 9, 1959; Simpson was a witness; Rosoto was bound over for trial. [Ex. C.]* Simpson was murdered February 7; Rosoto was tried by jury April 20, 21, 23 and 24 upon the three counts of robbery; pursuant to stipulation, Simpson's testimony was read in evidence; at the conclusion of the trial Rosoto was acquitted. [Ex. C; Ex. F-1, pp. 1-30.]*

In a lengthy indictment of the Orange County Grand Jury filed April 7, 1960, Rosoto was accused in Count I of conspiring with Michael Rosoto, Louis Suboter, Thomas Jenkyn and Warren Larson to commit burglary and robbery at the South Seas. Count II charged him with burglarizing the South Seas on March 9, 1957 and in Counts III, IV and V, he was accused of robbing Lloyd D. Welch and of kidnaping Welch and Fern Simpson to commit robbery. The burglary charged in Count II was alleged as an overt

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*Ex. C refers to the Superior Court file in Rosoto's prior robbery trial, Ex. F-1 and F-2 to the Reporter's Transcript thereof, both admitted in evidence herein, both certified to this Court by the Supreme Court of California.

act under Count I, and Counts III, IV and V were alleged to have been committed in furtherance of the conspiracy. [Clk. Tr. pp. 4-9.]* In Count VI, Rosoto, John Frank Vlahovich and Donald Glen Franklin were accused of murdering Simpson on February 7, 1959. Count VII charged Rosoto with perjury in denying his guilt at the April 1959 robbery trial. Count VIII charged Vlahovich with perjury as a witness at the robbery trial in furnishing Rosoto with an alibi. In Count IX Rosoto, Vlahovich and Franklin were accused of conspiring to obstruct and pervert justice by delaying, impeding and avoiding the criminal proceedings instituted against Rosoto in June 1957 and terminated in April 1959 by his acquittal of robbery. The murder charged in Count VI; an automobile accident in September 1957 and the perjuries charged in Counts VII and VIII were alleged as overt acts under Count IX. [Clk. Tr. pp. 9-21.]

Following the overruling of Franklin's demurrer to Counts VI and IX and the denial of motions of defendants to dismiss the indictment, defendants pleaded not guilty May 6, 1960; Rosoto entered additional plea of prior acquittal and once-in-jeopardy as to Counts I, II, III, IV and V. [Clk. Tr. pp. 271, 282-283.] Defendants made motions for separate trial; May 12, the motions were denied by the court. [Clk. Tr. pp. 283-284.]

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*Clk. Tr. refers to the Clerk's Transcript, Rep. Tr. refers to the Reporter's Transcript in the case of *People v. Rosoto*, 58 A. C. 309, 23 Cal. Rptr. 779. References to the Reporter's Transcripts of pre-trial proceedings will be as follows: Rep. Tr. followed by a date enclosed in brackets, then the page.

Trial by jury commenced May 23, 1960 and concluded September 29, 1960; at the close of the People's case Count III was dismissed as to Rosoto; at the conclusion of the trial defendants were found guilty of first-degree murder as charged in Count VI and guilty as charged in the remaining counts of the indictment. [Clk. Tr. pp. 286, 448, 501-507.] The matter of penalty was argued, no further evidence being introduced, and September 30 the jury determined that defendants should suffer death. [Clk. Tr. pp. 647-649.] They made motions for new trial and in arrest of judgment, which were denied by the court. The court pronounced judgment, sentencing Rosoto to state prison upon Counts I, II, IV, V, VII and IX, Vlahovich to prison upon Counts VIII and IX, Franklin to prison upon Count IX, and sentencing defendants to execution in the manner prescribed by law upon Count VI. [Clk. Tr. pp. 659-665, 691-699.]

Upon automatic appeal to the California Supreme Court the judgments were affirmed August 2, 1962. Petitions for rehearing were denied August 29, 1962 and the remittitur issued September 4, 1962.

## Introductory Statement.

The multitudinous events in this squalid case radiate from the armed robbery at the South Seas on March 9, 1957. The South Seas robbery was the seventh in a series of twelve robberies, burglaries and kidnapings for the purpose of robbery organized by Rosoco between November 1956 and April 1957, and the only one of the twelve in which Rosoto physically participated. Rosoto returned to Tacoma, Washington, in May 1957; proceed-

ings were commenced to extradite him for the South Seas robbery; September 11, 1957 he was hospitalized as the result of an automobile accident which he, his half-brother Michael and Vlahovich had arranged with one Hickman for the purpose of delaying his extradition; in December 1958, after conversations with Vlahovich and Franklin respecting the beating-up of witnesses, he voluntarily surrendered to the Orange County authorities; on January 9, 1959 he was held to answer for the South Seas robbery, Simpson, the owner, identifying him as one of the robbers; February 7, two or three hours after Rosoto boarded a plane for Tacoma, Franklin, Vlahovich and one Ralph Wesley Johnson took in ambush Leslie Simpson and his wife, killing Simpson with one shotgun blast, blowing off Mrs. Simpson's forearms with another as she crossed them in front of her face. At his trial in April 1959, Rosoto was acquitted of the South Seas robbery upon his own perjured testimony and the perjured testimony of Vlahovich. The foregoing facts were proved to the satisfaction of the jury in a lengthy trial.

## Statement of Facts.

In view of the length and complexity of the evidence and of the fact that Franklin was tried jointly with Joseph Rosoto and John Frank Vlahovich, petitioners in No. 749 Misc., October Term, 1962, respondent respectfully incorporates herein by reference the massive statement of facts contained in its Brief in Opposition to the petition of Rosoto and Vlahovich. Appropriate transcript references will, however, be made during the course of the ensuing argument.

## ARGUMENT.

### I.

### The Evidence Was Ample to Establish Franklin's Guilt of Murder and Conspiracy to Obstruct Justice.

Franklin contends that the evidence was insufficient to establish his guilt of murder, as charged in Count VI of the indictment, and of conspiracy to obstruct justice, as charged in Count IX. It was the People's theory that Leslie Simpson was murdered to prevent him from testifying at Rosoto's robbery trial and that Franklin, Vlahovich and Ralph Wesley Johnson participated in the killing, Johnson firing the fatal shot. The most potent evidence inculpating Franklin is set out in the opinion of the court below. (*People v. Rosoto*, 58 A. C. 309, 327-329, 23 Cal. Rptr. 779, 785-787, Appendix I to Franklin's Petition for Certiorari, pp. 3-7.) It is sufficient to say of this evidence that Franklin made damning admissions to Michael Rosoto, Rosoto's brother, and to one Barbara Hale, that the jury did not believe his own testimony and the testimony of his alibi witnesses that he was in Seattle, Washington at the time of the murder and that the jury had the benefit of rigorous cross-examination of Michael and Barbara. [Rep. Tr. pp. 451-453, 464-469, 479, 486a-488, 570, 625, 1233-1234, 1236-1240, 1333; *cf.* pp. 500-641, 706-724 (cross-examination of Michael), pp. 1240-1333, 1335-1347 (cross-examination of Barbara).]

The veracity of witnesses, their possible bias and motives, the accuracy of their memory, are all questions for the jury. This proposition is so elementary as to require no citation of authority to support it. Frank-

lin's admissions to Barbara and Michael were competent evidence against him and it can hardly seriously be contended, as Franklin appears to contend, that because they were "hearsay" they were not competent, and that because they were not made to the Archbishop of Canterbury they were not to be believed.

This is not a case of a conviction resting upon no evidence whatsoever. (*Cf. Thompson v. Louisville*, 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624.) It is a case of conflicting evidence where the jury, with ample reason, gave credence to the People's witnesses, withholding credence from the witnesses for the defense, and where the state reviewing court found the verdict to be amply supported. (*People v. Rosoto*, 58 A. C. 309, 329, 23 Cal. Rptr. 779, 787, Appendix I to Petition, p. 7.) Under traditional canons of review, such a finding is one this Court is obliged to accept. (*Lisenba v. California*, 314 U. S. 219, 238, 86 L. Ed. 166, 62 S. Ct. 280; *Thomas v. Arizona*, 356 U. S. 390, 402-403, 2 L. Ed. 2d 863, 78 S. Ct. 885; *Culombe v. Connecticut*, 367 U. S. 568, 603-604, 6 L. Ed. 2d 1037, 81 S. Ct. 1860.)

II.

**There Was No Deprivation of Due Process in the Denial of Franklin's Motion for a Separate Trial.**

Franklin next contends that it was an abuse of discretion constituting a denial of due process to deny his motion for a separate trial. It is the rule in this Court that the question whether co-conspirators are to be tried jointly or severally is one for the sound discretion of the trial judge. (*Opper v. United States*, 348 U. S.

84, 99 L. Ed. 101, 75 S. Ct. 158.) The rule in California is the same. (Penal Code, sec. 1098.)

Respondent submits that there was no abuse of discretion in denying Franklin's motion for a severance for the reasons set out in the opinion of the court below and which respondent respectfully incorporates herein by reference." (*People v. Rosoto*, 58 A. C. 309, 330-331, 23 Cal. Rptr. 779, 787-788, Appendix I to Petition, pp. 10-11.)

III.

**There Was No Deprivation of Due Process in the Court's Failure to Strike References to Franklin in Two Recorded Conversations Between His Codefendant Rosoto and the Latter's Half-Brother Michael.**

Franklin further contends that he was deprived of due process in that the trial judge did not strike references to him in two recorded conversations between Rosoto and his half-brother Michael. The first conversation occurred February 6, 1960 at the Skyway Motel in Los Angeles. [Rep. Tr. pp. 1565-1623.] The second conversation occurred over the telephone March 4, 1960. [Rep. Tr. pp. 683-703, 2776-2788.] Franklin made no request to the trial judge that references to him be stricken from the recording of the February 6 conversation or the transcript and recording of the March 4 conversation.

With respect to the latter (March 4), Franklin's counsel said:

> "I just want the record to be clear, your Honor, that it is understood that none of the statements made in this record are in any way binding upon

Mr. Franklin, having been made completely out of his presence. I don't know if they refer to him at all." [Rep. Tr. pp. 682-683.]

The court then instructed the jury that the conversation was not binding upon Franklin. [Rep. Tr. p. 683.] This conversation, utterly damning to Rosoto, is set out in full in respondent's Brief in Opposition to the petition of Rosoto and Vlahovich (No. 749 Misc., October Term, 1962). Although it contains references to Franklin, "There was nothing in the conversation that Franklin had engaged in any criminal activity or was about to do so." (*People v. Rosoto*, 58 A. C. 309, 341, 23 Cal. Rptr. 779, 794, Appendix I to Petition, p. 26.) In view of the foregoing, and of the further fact that the jury received formal instructions at the close of the trial not to regard evidence admitted against one defendant as evidence against the others [Clk. Tr. p. 534], there was no violation of due process in the court's failure to strike references in the transcript and the recording which it was not even requested to strike. "Our theory of trial relies upon the ability of a jury to follow instructions." (*Opper v. United States*, *supra*, 348 U. S. 84, 95, 99 L. Ed. 101, 75 S. Ct. 158.)

With regard to the former conversation (February 6), Franklin's counsel merely requested the court to repeat its prior admonition and the court instructed the jury that the conversation was not binding on him. [Rep. Tr. pp. 1563-1564.] What has just been said respecting the March 4 conversation is therefore applicable to the one of February 6. There was manifestly no denial of due process.

## IV.

## There Was No Denial of Due Process in Franklin's Cross-Examination.

Franklin finally contends that it was a deprivation of due process to permit cross-examination "upon matters untouched on direct, thereby permitting the expansion of the prosecution's evidence to make it applicable to petitioner." (Petition, p. 3.) This contention was convincingly answered in the opinion of the court below in a passage which is respectfully incorporated herein by reference. (*People v. Kosoto*, 58 A. C. 309, 343-345, 23 Cal. Rptr. 779, 795-796, Appendix I to Petition, pp. 29-32.)

## Conclusion.

Franklin was convicted of murder and conspiracy to obstruct justice upon evidence which satisfied the jury beyond a reasonable doubt and which was held sufficient by the California Supreme Court. He advanced on his appeal to that court a multitude of claims of error. These were answered by the court below in one of the longest and most comprehensive opinions in California judicial history. Some of the claims are advanced here as violations of due process. Respondent submits that they are untenable. In addition to the specific contentions replied to in the course of this brief, the petition is replete with vague and utterly unsubstantiated assertions, *e.g.*, that the case against Franklin was fleshed out by an attempt to "degrade and destroy" his character (Petition, p. 4), that "much

of the evidence was introduced in a manner to deny petitioner effective cross-examination" (Petition, p. 11) and that the prosecutor was guilty of persistent misconduct. (Petition, p. 11.) Respondent submits, upon the contrary, that Franklin was fairly tried and therefore respectfully requests this Court to deny his petition for certiorari.

Respectfully submitted,

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